

Interrogation Techniques

Description: The Obama Administration limits interrogation techniques to those found in the Army Field Manual. Gov. Romney, however, supports the use of enhanced interrogation techniques when needed to protect U.S. citizens. The policy paper will:

- Describe whether and how the Obama Administration's policy on interrogation is hampering the GWOT;
- Present options and recommendations for interrogation policy and protocols for use in GWOT cases.

I. Background

Beginning in approximately March 2002, the Bush Administration established a program, operated by the Central Intelligence Agency, to interrogate outside the United States a small number of detained terrorist leaders and operatives. The program was limited to members or supporters of al Qaeda, the Taliban, or associated terrorist organizations who were likely to possess information that could prevent terrorist attacks against the United States or that could help locate the senior leadership of al Qaeda. Of the thousands of unlawful combatants captured by the United States, fewer than 100 were detained and questioned in the CIA program. And of this number, fewer than a third were the subject of enhanced interrogation techniques.

The extent to which the enhanced interrogation techniques were valuable in generating intelligence has, of course, been hotly debated. It is difficult to settle the question definitively, especially because much of the relevant material remains classified. However, as discussed in more detail below, a number of first-hand and second-hand assessments in the public record conclude that the enhanced interrogation techniques were indeed quite valuable in generating intelligence.

Much of the legal framework now governing interrogation of terrorist detainees was established during President Bush's second term. In 2005, Congress passed the Detainee Treatment Act. This law required the Defense Department to interrogate detainees in accordance with the Army Field Manual. It also prohibited government agencies, including the CIA, from subjecting detainees to "cruel, inhuman, or degrading treatment or punishment" prohibited by the Fifth, Eighth, and Fourteenth Amendments.

In June 2006, the Supreme Court held in *Hamdan v. Rumsfeld* that Common Article 3 of the Geneva Convention was applicable to the conflict with Al Qaeda. Common Article 3 prohibits detainees from being subjected to violence, outrages upon personal dignity, torture, and cruel or degrading punishment. At the time, the War Crimes Act made any violation of Common Article 3 a crime. Thus, *Hamdan* opened the possibility that U.S. personnel could face criminal liability for earlier interrogations of al Qaeda.

On September 6, 2006, the Army released an updated version of the Field Manual that implemented the Detainee Treatment Act. The Manual authorized 19 interrogation techniques and expressly banned eight others, including waterboarding and depriving detainees of necessary food, water, or medical care.

The next month, Congress passed the Military Commissions Act of 2006. This law amended the War Crimes Act provisions concerning Common Article 3 so that only *specified* violations are criminal (as opposed to *any* Common Article 3 violation, as had previously been the case). The new law did not criminalize all conduct that violated the standards of the Detainee Treatment Act – that is, cruel, inhuman, or degrading treatment of the kind that violates the Fifth, Eighth, and Fourteenth Amendments. However, the Act authorized the President, acting pursuant to an Executive Order, to interpret the meaning and application of Common Article 3 to promulgate higher standards and administrative regulations for violations of Geneva Convention obligations, except as they involve “grave breaches” of the Conventions.

On July 20, 2007, President Bush issued such an Executive Order authorizing the CIA to use six enhanced interrogation techniques against members or supporters of al Qaeda or the Taliban who likely possess information that could assist in detecting or deterring a terrorist attack against the United States or locate senior leadership of those groups.¹ On the same day, the Justice Department’s Office of Legal Counsel issued a lengthy opinion concluding that these six techniques, when used against high-value detainees belonging to Al Qaeda and affiliated groups under specified conditions and safeguards, was consistent with all applicable laws.

On January 22, 2009, on his second full day in office, President Obama issued a new Executive Order concerning detainee interrogation. This Executive Order rescinded the Bush Executive Order, banned enhanced interrogation techniques across the U.S. government, and generally provided that the methods listed in the Army Field Manual were the only ones authorized for interrogation of anyone in U.S. custody while in an armed conflict.

In April 2009, President Obama declassified and released to the public several legal Bush-era opinions from the Justice Department’s Office of Legal Counsel (OLC) that described the enhanced interrogation techniques in detail and analyzed their legality.

¹ The list of authorized techniques, which has since been declassified, included the following:

- (1) Dietary manipulation.
- (2) Extended sleep deprivation for up to 96 hours and no more than 180 hours over a 30-day period (including through use of physical restraints to prevent the detainee from falling asleep).
- (3) Use of a “facial hold” to briefly keep the detainee’s head immobile.
- (4) An “attention grasp,” in which an individual would be grabbed on each side of a collar opening for a few seconds.
- (5) Abdominal slaps; and
- (6) Insult or facial slaps.

Later in 2009, the Obama Administration created a special interrogation group to coordinate interrogation of high-level terrorist suspects. The mission of this High-Value Detainee Interrogation Group (HIG) was to coordinate the deployment of mobile teams of experienced interrogators, analysts, subject matter experts and linguists to conduct interrogation of high-value terrorists.

II. Impact of the Obama Administration's Terrorism Policy on the GWOT

It is difficult to point to *concrete* ways in which the Obama Administration's renunciation of enhanced interrogation techniques has undermined America's efforts in the fight against terrorism. First, at this point, we do not know whether the Obama Administration has taken into custody any terrorists who would have been candidates for enhanced interrogation techniques under President Bush's 2007 Executive Order. Second, even if the Administration has apprehended any such individuals, it is difficult to argue conclusively that enhanced interrogation techniques would have generated more information than the techniques in the Army Field Manual; we don't know what we don't know.

That said, there are a number of reasons to believe that the Obama Administration's interrogation policies have hampered (or will hamper) the fight against terrorism.

First, at the highest level of generality, President Obama's Executive Order has tied America's hands with respect to detainee interrogation. As Director Hayden has described it, there is a universe of lawful interrogation techniques that we should feel, as a nation, that we have a right to use against our enemies. The Army Field Manual describes only a subset of that universe, and few people claim that this subset constitutes all the tools that could or should be legitimately available to defend the country. Put another way, President Obama has wide discretion in the types of techniques his Administration may use to interrogate America's enemies; by restricting his Administration to the Army Field Manual, the President has affirmatively chosen not to exercise the full range of his discretion.

Second, in addition to being incomplete as a catalogue of lawful interrogation techniques, the Army Field Manual is ill-suited to serve as a one-size-fits-all approach to detainee interrogation by U.S. agencies. The Army Field Manual was written for a specific population operating in a specific context: (1) millions of (2) relatively young men and women in the military (3) who have not received exhaustive training in this area, and who will be interrogating (4) large numbers of (5) primarily lawful enemy combatants (6) whose intelligence is primarily of transient and tactical value. By contrast, the Bush-era CIA program of which enhanced interrogation techniques were a part involved (1) a small population of (2) older men and women affiliated with the CIA (3) who have received extensive training, and who were interrogating (4) a very small handful of (5) unlawful combatants (6) who likely possess intelligence about future terrorist attacks against the United States. The Army Field Manual may well be adequate for the

population and purposes for which it was written; there is good reason to doubt that it is adequate for all populations and all purposes.

Third, the Army Field Manual is publicly available on the Internet. The CIA has stated that it believes many al Qaeda operatives receive training in the resistance of interrogation methods and that al Qaeda actively seeks information regarding U.S. interrogation methods in order to enhance that training. By committing the United States to using only techniques that are a mouse click away, the Obama Administration has made it that much more difficult for interrogators to do their jobs effectively.

Fourth, there is ample evidence in the public record that enhanced interrogation techniques did indeed generate significant intelligence during the Bush years. A sampling of this evidence includes:

- The use of enhanced interrogation techniques on Khalid Sheikh Muhammad (“KSM”) led to the discovery of a plot, the “Second Wave,” to use East Asian operatives to crash a hijacked airliner into the Library Tower in Los Angeles. Information from KSM led to the capture of many of the operatives planning the attack.
- The use of enhanced interrogation techniques on Abu Zubaydah furnished detailed information regarding al Qaeda’s organizational structure, key operatives, and modus operandi, and identified KSM as the mastermind of the September 11 attacks. Information from Zubaydah also helped in the planning and execution of the operation in which KSM was captured.
- Former CIA Director George Tenet, who served under Presidents Clinton and Bush, stated in a television interview in April 2007: “I know that this program has saved lives. I know we’ve disrupted plots. I know this program alone is worth more than the FBI, the Central Intelligence Agency, and the National Security Agency put together have been able to tell us.”
- Former CIA Director Hayden has stated that as late as 2006, fully half of the government’s knowledge about the structure and activities of al Qaeda came from those interrogations.
- On April 16, 2009, President Obama’s own Director of National Intelligence, Dennis Blair, wrote: “High value information came from interrogations in which those methods were used and provided a deeper understanding of the al-Qaeda organization that was attacking this country.”²
- In May 2011, Obama’s CIA Director, Leon Panetta, confirmed that waterboarding and other enhanced interrogation techniques helped extract “useful information” that, along

² Five days later, once this memo became public, DNI Blair issued a clarifying statement. He continued to acknowledge that “[t]he information gained from these techniques was valuable in some instances.” However, he added that there was no way of knowing whether that information could have been obtained through other means; that the techniques were not needed to keep America safe; and that the damage they have caused far outweighed the benefits gained.

with other sources, led to the discovery of the compound in Pakistan where Osama bin Laden was hiding.

By renouncing enhanced interrogation techniques, the Obama Administration has, at a minimum, put at risk our ability to generate analogous intelligence from detainees captured today.

Fifth, the Obama Administration permanently damaged the potential effectiveness of the Bush-era enhanced interrogation techniques by declassifying the OLC memos and releasing them to the public.

III. Options and recommendations for interrogation policy and protocols for use in GWOT cases

Governor Romney has consistently supported enhanced interrogation techniques. Governor Romney is also on record as stating that he does not believe it is wise for him, as a presidential candidate, to describe precisely which techniques he would use in interrogating detainees. The combination of these two positions, as well as the information presented above, leads to two principal options in this area for his campaign.

The first option is that Governor Romney could pledge that upon taking office, he will rescind and replace President Obama's Executive Order restricting government interrogators to the Army Field Manual. Consistent with the authority reserved for the President under the Military Commissions Act, he could commit his Administration to authorizing (classified) enhanced interrogation techniques against high-value detainees that are safe, legal, and effective in generating intelligence to save American lives. But because President Obama's release of the OLC memos has reduced the number of available techniques that meet these criteria, Governor Romney should not commit in advance to a timetable for implementing this plan; it may well take time to identify potential techniques and analyze their effectiveness and legality.

The second, more cautious option is for Governor Romney to pledge only that upon taking office, he will conduct a comprehensive review of interrogation policy under Presidents Bush and Obama. He could promise that if this process leads to the identification of techniques that would constitute a viable and legal enhanced interrogation program, he will rescind the Obama Executive Order and approve such a program. The advantage of this option is that it presents the Governor as open-minded and empirically driven. The disadvantage is that it may show insufficient zeal for doing whatever it takes to protect America.

The Subcommittee recommends the first option. Governor Romney has recognized for years that the sounder policy outcome is the revival of the enhanced interrogation program. And a reluctance by the Governor to expressly endorse such an outcome during the campaign could become a self-fulfilling prophecy once he takes office by signaling to the bureaucracy that this is not a deeply-felt priority.